

Melby's 1992-1993 salary was \$423.00 less. All three teachers objected.

On April 21, 1992, at their regular meeting, the Trustees held a hearing pursuant to § 20-4-204(4), MCA. The District did not offer any evidence of just cause for a reduction in force or reduction in salary. The only record of this proceeding is a 26 page typed document captioned "High School Meeting, Glendive Contract Reductions April 21, 1992." It was attached as "Exhibit C" to the teachers' prehearing brief to the County Superintendent.

The DCHS Trustees voted to reduce the teachers' salaries and the teachers appealed to the County Superintendent. The County Superintendent upheld the Trustees' decision without a hearing. The teachers then appealed to the State Superintendent. The County Superintendent's record was filed and the parties submitted briefs.

PROCEDURE

The only hearing in this matter was on April 21, 1992, before the Trustees. "Exhibit C" does not identify who is present, who is hearing the matter, consistently who is speaking, or who is representing whom. No exhibits were offered.

On appeal to the County Superintendent, the parties stipulated that "this matter may be submitted by briefs, and that no further evidence, other than that recited in the Prehearing Memorandum and Order is necessary." (August 14, 1992, Stipulation, pp. 1-2.) The County Superintendent's Order does not list which exhibits, if any, she received into the record and there is no explanation of the substance of the exhibits. The only exhibits in the County

Superintendent's file are attachments to the Petitioners' Reply Brief. These are marked A-M and P. There are no exhibits N, P, or 1-8.

STANDARD OF REVIEW

This Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in ARM 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed under an abuse of discretion standard. Harris v. Trustees, Cascade County School Districts No. 6 and F, 786 P.2d 1164, 241 Mont. 274 (1990). The petitioner bears the burden of showing that he has been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents, 714 P.2d 151, at 153, 220 Mont. 214, at 217 (1986).

The State Superintendent may not substitute her judgment for that of a County Superintendent as to the weight of the evidence on questions of a fact. Findings are upheld if supported by substantial, credible evidence in the record. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." Wage Appeal v. Board of Personnel Appeals, 676 P.2d 194, at 198, 208 Mont. 33, at 40 (1984). State Compensation Mutual Insurance Fund v. Lee Rost Logging, 827 P.2d 85, at 88, 252 Mont. 97, at 102 (1992).

Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 803 P.2d 601, at 603, 245 Mont. 470, at 474 (1990).

DECISION AND ORDER

The County Superintendent's order concluded "The determination of the Board that justifiable economic necessity exists for a reduction in the extra hours contracted for by Petitioners and a proportionate reduction in their salaries will not be disturbed." (Findings of Fact and Conclusions of Law, pp. 5-6.) Justifiable economic necessity is a question of fact. The record filed on appeal does not contain substantial, credible evidence of economic necessity. The County Superintendent does not state what evidence she relied on. Her order does not summarize the substance of the evidence received and considered. This Superintendent cannot find any economic evidence in the record filed on appeal.

The decision of the County Superintendent is REMANDED for reconsideration using the standards set forth in this Order. This does not mean additional evidence can be accepted. The County Superintendent should review the existing record to determine:

One, if the DCHS Trustees offered substantial, credible evidence of economic necessity for reducing tenured teachers' salaries. And,

Two, if the DCHS Trustees offered substantial, credible evidence that reduction of tenured teachers' salaries is a part of a uniform plan of cost reduction affecting the entire district.

The County Superintendent made her decision without a hearing at the request of both parties. This is acceptable procedure but it puts an additional burden on the County Superintendent -- the informal proceeding requirements of § 2-4-604, MCA, must be followed

Whether or not there is a hearing there has to be a record on review. This Superintendent or a Court must be able to understand what evidence the County Superintendent received and what evidence she relied on in support of her findings, To use an informal proceeding the County Superintendent's order must contain a "statement of the substance of the evidence received or considered." (Section 2-4-604(2) (e), MCA.) If on remand the County Superintendent still finds substantial credible evidence exists to support the reduction in salary her order must contain a statement of the substance of all the evidence received and considered. The order should also refer to what substantial credible evidence supports her finding.

DISCUSSION

A. This Dispute is Governed by the Tenure Statutes.

The Trustees argue that the salary reductions are not a matter governed by the tenure statutes. This is incorrect. Section 20-4-203, MCA, states:

(1) Except as provided in 20-4-208, whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher is considered to be reelected from year to year thereafter as a tenure teacher at the same salary and in the same or a comparable position of

employment as that provided by the last executed contract with the teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204. (Emphasis added.)

Tenure statutes do not guarantee employment or salary but they do guarantee procedural fairness in employment decisions. Tenure statutes require trustees to offer evidence of just cause for decisions that adversely affect tenured teachers' employment rights, which include salary, and they provide teachers with a process for appealing decisions.

In Sorlie v. Trustees, Yellowstone County School District No. 2, 667 P.2d 400, at 404, 205 Mont. 22, at 31, 40 St.Rep. 1070, at 1075 (1983), the Montana Supreme Court wrote: "The tenure statute requires a tenured teacher to maintain the same salary year after year." The Court cited to an earlier decision, Keiser v. State Bd. of Regents of Higher Education, 630 P.2d 194, 193 Mont. 35, 38 St.Rep. 674 (1981) in support of this. Because equivalent salary is a tenure right, it follows that any reduction in salary is a reduction in tenure rights and the procedural safeguards attached to dismissal also apply to a reduction in salary.

B. Insufficient Evidence of Economic Necessity in the Record to Justify a Reduction in Salary.

The teachers argue that the Sorlie decision precludes a reduction in the salary of a tenured teacher. Based on the reasoning of Harris v. Trustees, Cascade County School Districts No. 6 and F, 786 P.2d 1164, 241 Mont. 274 (1990), this conclusion is incorrect. In Sorlie, the Court held that reassignment from an administrative to a teaching position because of legitimate

financial constraints was justifiable and not contrary to tenure laws. In Harris, school trustees eliminated a tenured teacher's full-time position because of legitimate financial constraints, then hired another teacher for a half-time position teaching the same subject. The Court allowed the termination of the full-time position but required that the trustees hire the terminated teacher for the part-time position.

Based on Harris, it appears that tenured teacher salaries can be reduced if there is evidence of justifiable financial constraints. The record before this Superintendent does not contain evidence that establishes justifiable financial constraint in this case.

The tenure laws require that just cause exists before a tenured teacher's employment rights are diminished. Trustees faced with adverse economic conditions have just cause to initiate a reduction in force. Sorlie v. Trustees, Yellowstone County School District No. 2, 205 Mont. 22, 667 P.2d 400, 40 St. Rep. 1070 (1983). There are also other reasons that could establish just cause for a reduction in force -- drop in enrollment, curriculum changes, etc. Establishing just cause for a reduction in force or in teacher's employment rights is only the first step in a process, however. A board of trustees must then decide how to respond using objective criteria that are fairly applied.

Reducing tenured teachers' salaries is one response but to do so requires evidence of justifiable financial constraint. While just cause to reduce force can be based on enrollment drop,

curriculum change, etc., the just cause to reduce salary can only be established with economic evidence. Salary is a specifically named employment right of a tenured teacher. Section 20-4-203, MCA, protects a teacher's employment "as a tenure teacher at the same salary."

Other states have held that the reduction of salary of tenured teachers cannot occur unless the reduction is a part of a uniform plan affecting the entire district. Huff v. Harlan County Board of Education, 408 S.W.2d 457 (Ky.1966). Given the language of § 20-4-203, MCA, "as a tenure teacher at the same salary," the reasoning in Huff should also apply in Montana. Reduction in a tenured teacher's salary in response to justifiable economic necessity must be part of a reasonable, systematic district-wide plan. A district cannot, as in this case, simply select particular teachers for a reduction in salary.

There is no economic evidence in this record. Superintendent Martin refers to "budget committee recommendation" but the record does not contain any documentation or explanation. There is nothing in the record, other than the Superintendent's recommendation, to justify reducing these three tenured teachers' salaries. Exhibit I filed with the County Superintendent shows that the Superintendent made the recommendation before a line item budget was prepared. It appears that the District arbitrarily chose these three teachers' salaries for potential savings without an overall plan for cost reduction. The record is not even clear
/ /

as to whether or not the salaries of all teachers with extended contracts were reduced.

C. 42 Attorney General Opinion 49 (1987).

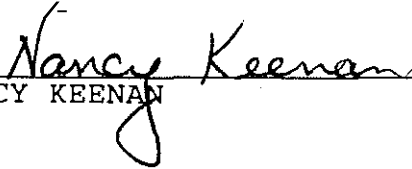
There is no legal support for the Trustees' argument that, as a matter of law, their action was not a reduction of tenured teachers' salaries. The Trustees incorrectly argue that 42 A.G. Op. 49 (1987) supports their position.

42 A.G.Op. 49 interpreted the "same salary" language of § 20-4-203, MCA. The Attorney General wrote "'Salary' is generally defined by courts as fixed compensation paid regularly for services." (42 A.G.Op. 49, p. 193.) The opinion defined compensation in the form of sick leave, insurance benefits, vacation time, etc., as "fringe benefits." The Attorney General distinguished salary, or basic pay, from fringe benefits and wrote "I conclude that the term 'at the same salary' means at the same basic pay, but does not include other fringe benefits." (42 A.G. Op. 49, p. 194.)

42 A.G. Op. 49 explains that the tenure statute does not preclude collective bargaining of fringe benefits. The issue in this case is a yearly salary -- a fixed compensation paid regularly for services. If the Trustees were correct, however, that the extended contract payment to these teachers was a fringe benefit, not salary, they still could not unilaterally reduce three teachers' fringe benefits. The matter would be the subject of
//

collective bargaining between the DCHS Trustees and the teachers' collective bargaining unit,

DATED this 11 day of March, 1994.


NANCY KEENAN

CERTIFICATE OF SERVICE

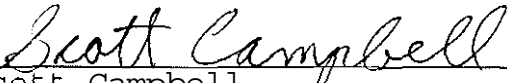
THIS IS TO CERTIFY that on this 11th day of March, 1994, a true and exact copy of the foregoing Decision and Order was mailed, postage prepaid, to the following:

Carey E. Matovich
MATOVICH, ADDY & KELLER
225 Petroleum Building
2812 First Avenue North
Billings, MT 59101

Board of Trustees
Dawson Co. High School Dist.
P.O. Box 701
Glendive, MT 59330

Jean Grow
Dawson County Superintendent
County Courthouse
207 West Bell
Glendive, MT 59330

Richard A. Simonton
SIMONTON, HOWE & SCHNEIDER
102½ West Bell
P.O. Box 1250
Glendive, MT 59330


Scott Campbell
Paralegal-Assistant
Office of Public Instruction